

§ 76.23 Subpoenas.

(a) Requests for the issuance of subpoenas requiring the attendance and testimony of witnesses or the production of documents or other evidence under 21 U.S.C. 875 and 876 shall be filed with the Judge. Subpoenas are not ordinarily required to obtain the attendance of federal employees as witnesses, but such testimony shall be sought first by filing a request with the United States Attorney.

(b) Requests for subpoenas shall be filed with the Judge in writing and shall specify with particularity the books, papers, or testimony desired, supported by a showing of general relevance and reasonable scope, and a statement of the facts expected to be proven thereby. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses or documents to be found.

(c) A party seeking a subpoena for the attendance of a witness at a hearing shall file a written request therefor not less than fifteen (15) days before the date fixed for the hearing unless otherwise allowed by the Judge upon a showing of good cause.

(d) The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

(e) Unless otherwise ordered by the Judge, the party seeking the subpoena is responsible for service of the subpoena. A subpoena may be served by any person at least eighteen (18) years of age who is not a party, including a private process server or other person authorized to serve process in actions brought in state courts of general jurisdiction or in Federal courts. Service shall be by personal delivery. Proof of service shall be made by affidavit of the person serving a subpoena entered on a true copy of the subpoena.

(f) A party or the individual to whom the subpoena is directed may file with the Judge a motion to quash the subpoena within ten (10) days after service of the subpoena, or on or before the time specified in the subpoena for compliance if it is less than ten (10) days after service.

(g) Upon failure of any person to comply with a subpoena issued by the Judge, the Attorney General, in the name of the Judge, but on relation of the party, shall institute proceedings in the appropriate district court for the enforcement of the subpoena, unless the enforcement of the subpoena would be inconsistent with law. Neither the Attorney General nor the Judge shall be deemed thereby to have assumed responsibility for prosecution of the same before the court.

§ 76.24 Protective order.

(a) A party or a prospective witness or deponent may seek to limit the availability or disclosure of evidence by filing a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing.

(b) In issuing a protective order, the Judge may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, or to protect privileged information including one or more of the following orders:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be the subject of inquiry, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the Judge;

(6) That the contents of discovery or evidence be sealed;

(7) That a sealed deposition be opened only by order of the Judge;

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Judge.

§ 76.25 Fees.

Unless otherwise ordered by the Judge, the party requesting a subpoena shall pay the cost of the fees and mileage of any witness subpoenaed. Such

costs shall be in the amounts that would be payable to a witness in a proceeding in United States district court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of the complainant, a check for witness fees and mileage need not accompany the subpoena.

§ 76.26 Sanctions.

(a) As necessary to meet the ends of justice, the Judge may impose sanctions upon any party or a party's counsel, including, but not limited to sanctions based upon the following reasons:

(1) Failure to comply with an order, rule, or procedure governing the proceeding;

(2) Failure to prosecute an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the proceeding.

(b) Any such sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission the Judge may, as appropriate under law:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission as to unprivileged matters, deem admitted each matter of which an admission is requested;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought;

(4) Strike any appropriate part of the pleadings or other submissions of the party failing to comply with such order; and

(5) Permit the requesting party to introduce secondary evidence concerning the information sought.

(d) If a party fails to prosecute an action under this part commenced by service of a notice of hearing, the Judge may dismiss the action.

(e) If a respondent who has requested a hearing pursuant to 28 CFR 76.4, and who has been served with a Notice of a Hearing under 28 CFR 76.6, fails to appear at the hearing, absent good cause shown by the respondent, the Judge may issue an initial decision imposing a penalty.

(f) The Judge may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

§ 76.27 The hearing and burden of proof.

(a) The Judge shall conduct a hearing on the record in order to determine whether the respondent is liable for a civil penalty under 28 CFR 76.3 and, if so, the appropriate amount of any such civil penalty, considering the income and net assets of the respondent.

(b) The United States Attorney shall prove respondent's liability and appropriateness of the amount of the penalty by a preponderance of the evidence.

(c) The respondent shall prove any affirmative defenses by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise closed by the Judge for good cause shown.

§ 76.28 Location of hearing.

The hearing shall be held in the judicial district of the United States Attorney's Office having jurisdiction over the matter.

§ 76.29 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the Judge and to the extent otherwise permitted by law, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties, along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena, if necessary, such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in 28 CFR 76.22.